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IN THE

Supreme Court of the United States

OCTOBER TERM 1956

EDGAR E. HOPPE, *Petitioner*

v.

THE UNITED STATES, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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No.

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v.

THE UNITED STATES, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Claims, entered in the above-entitled case on October 2, 1956.

CITATION TO OPINION BELOW

The opinion of the United States Court of Claims (R. 97) is printed in Appendix B hereto, infra p. 2a.

JURISDICTION

The judgment of the United States Court of Claims was entered on October 2, 1956 (R. 97).

Rehearing was denied on March 6, 1957 (R. 105). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1255(1).

QUESTIONS PRESENTED

1. Whether Congress intended to have the dismissal of a Civil Service employee reviewed on the merits by the Civil Service Commission pursuant to the provisions of the Act of August 24, 1912.

2. Whether the Civil Service Commission acted within its authority in classifying the appellate record and its investigation of dismissal of petitioner as privileged and confidential and whether such classification was a denial of due process of law and a denial of equal protection of the laws.

3. Whether the United States Court of Claims and the United States Civil Service Commission erred in upholding dismissal of petitioner as being procedurally valid.

4. Whether the full protection of the Act of August 24, 1912 was denied to petitioner when the Civil Service Commission denied petitioner's appeal without considering representation of counsel at the first level of appeal.

STATUTE INVOLVED

The statutory provision involved is Section 652 of the Lloyd-LaFollette Act of 1912, 37 Stat. 555, 5 USC 652.

STATEMENT

On July 17, 1953, petitioner was employed in the Treasury Department, Internal Revenue Service, in the position of Assistant Commissioner (Inspection),

Grade GS-18. By letter dated July 17, 1953, from O. Gordon Delk, Deputy Commissioner, petitioner was notified of proposed agency action to separate him in not less than fifteen (15) full days from the date of receipt of said letter. Said letter reflected that petitioner was charged with:

I. Lack of ability to develop an appropriate inspection program for the Internal Revenue Service.

II. Lack of ability to appropriately organize and control a going organization.

III. Failure to exhibit the degree of objectivity and sound judgment essential to the adequate performance of a high-level Federal executive position.

Under each of the foregoing was a list of proposed specific events which allegedly were the basis of each charge. Petitioner submitted a response under date of July 27, 1953, which response alleged illegal acts on the part of his superiors and which have never been denied. By letter dated August 19, 1953, the Secretary of the Treasury notified petitioner that an additional charge was placed against him. This added charge was as follows:

"The tone of the reply made by you on July 27, 1953, including the allegation that the preferring of charges by the Commissioner against you was the result of a conspiracy and constituted a threat to the security of the other employees of the Internal Revenue Service, clearly demonstrates your inability to work loyally and efficiently under the Commissioner and Deputy Commissioner of the Internal Revenue Service and demonstrates that

your separation will promote the efficiency of the Service."

Petitioner responded and by letter dated October 7, 1953, was notified that his removal was effective at the close of business October 7, 1953. (R. 38).

Petitioner subsequently appealed to the Civil Service Commission, which appeal was denied by letter dated November 12, 1953 (R. 49) without having considered the representation of counsel for petitioner (R. 68, 69).

Petitioner subsequently exhausted his administrative remedies before the Civil Service Commission which on May 24, 1955, finally affirmed petitioner's dismissal (R. 57, 58).

Petitioner filed suit in the United States Court of Claims on August 19, 1955, which Court by decision of October 2, 1956, (R. 97-104) Appendix B, infra p. 2a by a 3-2 vote denied petitioner's claim. On November 30, 1956, petitioner filed a motion for rehearing (R. 105) and on March 6, 1957, the Court denied the motion without opinion (R. 105).

REASONS FOR GRANTING THE WRIT

1. Denial of a review on the merits of the dismissal of petitioner is in conflict with the intent of Congress in enacting the Lloyd-LaFollette Act of August 24, 1912, 37 Stat. 555, 5 USC 652. The purpose of the Act of 1912 was to change existing law by restricting the discretionary power of superior officers in matters of removals. It was designed to give greater security to those occupying subordinate positions and thereby to improve the public service by requiring that removals shall be for only such cause as will promote the

efficiency of the service. The Act of 1912 amends previous civil service law, adding thereto an additional section to remove a fault and better the then existing law. *U. S. ex rel Palmer* v. *Lapp*, 244 Fed. 377.

The Civil Service Commission was established by Congress to establish and protect a merit system of employment in Government service. To it was endowed the power to control arbitrary dismissals and protect career civil servants. Herein, the Civil Service Commission failed to review on the merits the dismissal of petitioner and contended that it had no such power to review, absent the right to a hearing which the Act of August 24, 1912 does not confer. Petitioner submits that the right to a hearing in no way affects the duty of the Civil Service Commission to review all dismissals on the merits. It has the investigative power and the duty under law to protect the merit system from summary removals of employees. Herein, the Commission not only failed to fully and carefully investigate dismissal of petitioner but also refused to review the merits of petitioner's dismissal. In so acting the Civil Service Commission did not follow the intent of Congress when it enacted the Lloyd-LaFollette Act. (Cong. Rec. Vol. 48, Part 6, 62nd Cong., pp. 5637, 5638.)

The failure of the Commission to review all dismissals of Federal employees on the merits is a denial to all such employees of the protective benefits intended by Congress in the Act of August 24, 1912.

2. The Civil Service Commission herein denied to petitioner his protective benefits under the Act of August 24, 1912, by classifying the investigative and appeal record as privileged and confidential (Exhibit

E, p. 24 Motion for Rehearing). This classification arbitrarily invoked by the Civil Service Commission and without any legal precedent denied to petitioner his lawful right to fully prosecute his appeal as Congress intended. Indeed, this arbitrary action is in conflict with the decision of the United States Court of Appeals for the Ninth Circuit in the case of *Parker* v. *Bester*, 227 F. 2d 708 wherein the Court quoted from *Morgan* v. *U. S.*, 304 U.S. 1; 58 S. Ct. 773; 82 L. Ed. 1129 as follows:

> "Those who are brought into contest with the government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command."

The Court in the Parker case, supra, also stated, inter alia:

> "When it is proposed to take from a citizen through administrative proceedings some right which he otherwise would have, the Constitution requires that he be afforded notice and an opportunity to be heard."

This Court in *Weiman* v. *Updegraff*, 344 U.S. 183; 73 S. Ct. 215; 97 L. Ed. 216 stated:

> "Constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory."

Applying the foregoing to petitioner there is readily apparent the denial of his constitutional rights by the arbitrary classification as privileged and confidential by the Civil Service Commission of the investigative and appeal record. Petitioner was denied the pro-

tection the statute afforded him. His statutory right to be protected from summary dismissal was denied by the Civil Service Commission.

3. Petitioner avers herein that the decision of the Civil Service Commission and the decision of the United States Court of Claims in declaring dismissal of petitioner to be procedurally valid is in direct conflict with the decision of the United States Court of Appeals for the District of Columbia in the case of *Mulligan* v. *Andrews*, 93 App. D. C. 375, 211 F. 2d 28, wherein the Court stated:

> "Administrative proceedings for removal of employees from the classified Civil Service are governed by 5 U.S.C. Sec. 652 (a), and the regulations and administrative interpretation promulgated thereunder.
>
> "The first sentence of section 652 (a) 'contains two broadly stated conditions requisite for removal of an employee from the classified Civil Service.' They are '(1) for such cause as will promote the efficiency of such service and (2) for reasons given in writing.' Specific requirements for fulfilling those conditions are set forth in the very next sentence of the section. These requirements are that an employee must be served with a notice of the charges preferred against him, be afforded an opportunity to refute them by answer, and 'be furnished with . . . a written decision on such answer.' The applicable regulation makes clear that this decision must state the 'reasons' for removal. And, according to the Civil Service Commission's administrative interpretation of its regulations, a decision adverse to the employee can be based only upon reasons contained in the original notice of proposed adverse action.

> "Plainly, and we so hold, the requirement of 'reasons' for removal is not satisfied in this case by the conclusion of 'unsuitability' based upon vague references to appellant's answer and 'facts developed during the investigation.' The decision failed to disclose which of the charges contained in the notice of proposed adverse actions were relied upon for removal; or, indeed whether removal rested upon any of the charges. Under the provisions of the statute and of the regulations outlined above, only findings upon such charges specifically identified, can constitute the 'reasons' required in the adverse decision."

The notice given to petitioner herein lends nothing to support a belief that he had been given all reasons for his dismissal. Petitioner was not advised as fully as was Mr. Mulligan. Similarly, the decision of the Court of Claims herein is in direct conflict with its own decision in the case of *Blackmar* v. *U. S.*, 120 Fed. Supp. 498, No. 170-52, decided April 6, 1954, wherein the Court stated, inter alia:

> "Some portions of the charges against Mr. Blackmar were defective. Where defective charges are explicitly excluded by the administrative adjudicators in their consideration of the merits, we have declined to intervene. However, in the absence of a clear statement from the Commission as to which charges formed the basis of its determination on the merits, we can only rely on the record before us . . . plaintiff's discharge was based, in part, on charges which did not meet the statutory requirements of specificity . . ."

The Civil Service Commission in its decision of May 24, 1955 (R. 57-58) advised that it was precluded from reviewing the sufficiency of reasons for removal of petitioner "even though it is recognized that some

of the reasons preferred in the notice of proposed action or cited in the adverse decision letter may not be procedurally valid under the law and regulations." Petitioner submits that the *Blackmar* case, supra, should control and petitioner's dismissal voided as procedurally invalid.

4. The record herein is lucid on the failure of the Civil Service Commission to consider representations of counsel for petitioner at the first level of appeal (R. 52; 68). Such a denial of the right of representation by counsel to petitioner is a denial of his Constitutional right to counsel and is a denial of the full and fair protection of the Act of August 24, 1912. The most important phase of petitioner's administrative appeal herein was determined without giving any consideration to petitioner's representations as made by counsel. This is a denial of administrative due process and hence should invalidate petitioner's dismissal. The United States Court of Claims did not rule affirmatively on this matter and petitioner submits that such failure is reversible error.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN P. WITSIL
THOMAS A. DALY
Counsel for Petitioner

June 4, 1957

APPENDIX A

The so-called Lloyd-LaFollette Act of 1912, 37 Stat. 555, 5 U.S.C. 652(a) provides:

> (a) No person in the classified civil service of the United States shall be removed or suspended without pay therefrom except for such cause as will promote the efficiency of such service and for reasons given in writing. Any person whose removal or suspension without pay is sought shall (1) have notice of the same and of any charges preferred against him; (2) be furnished with a copy of such charges; (3) be allowed a reasonable time for filing a written answer to such charges, with affidavits; and (4) be furnished at the earliest practicable date with a written decision on such answer. No examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer or employee directing the removal or suspension without pay. Copies of the charges, the notice of hearing, the answer, the reasons for removal or suspension without pay, and the order of removal or suspension without pay shall be made a part of the records of the proper department or agency, as shall also the reasons for reduction in grade or compensation; and copies of the same shall be furnished, upon request, to the person effected and to the Civil Service Commission. * * *

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

No. 323-55

(Decided October 2, 1956)

EDGAR E. HOPPE v. THE UNITED STATES

Mr. John P. Witsil for the plaintiff.

Miss Kathryn H. Baldwin, with whom was *Mr. Assistant Attorney General George Cochran Doub*, for the defendant. *Mr. George Leonard Ware* was on the brief.

ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

JONES, *Chief Judge*, delivered the opinion of the court:

Plaintiff, a former Government employee, sues to recover salary accruing to him from the time of his allegedly illegal removal on October 7, 1953. Defendant has moved for summary judgment.

Plaintiff had been a civil service employee in the Bureau of Internal Revenue and the Internal Revenue Service since August 1929. Effective August 11, 1952, plaintiff was promoted to the position of Assistant Commissioner (Inspection), Grade GS-18. It appears that under section 3 of Reorganization Plan No. 1 of 1952, effective March 14, 1952, 66 Stat. 823, 26 U. S. C. 3905 note (1952 Ed.), appointments to the positions of Assistant Commissioner of Internal Revenue were to be made under the classified civil service. While the matter is not entirely clear, plaintiff evidently was appointed in accordance with this statute.

By letter dated July 17, 1953, O. Gordon Delk, Deputy Commissioner of Internal Revenue, proposed to separate

plaintiff from the Internal Revenue Service, on the ground that he had not adequately performed the duties of his position and that his separation would promote the efficiency of the service. In support of this proposed action the letter advanced certain reasons, each followed by one or more specifications. By letter of July 27, 1953, plaintiff made a lengthy reply to the charges. As a result of this letter another specification was added to the original charges. This specification stated:

> The tone of the reply made by you on July 27, 1953, including the allegation that the preferring of charges by the commissioner against you was the result of a conspiracy and constituted a threat to the security of the other employees of the Internal Revenue Service, clearly demonstrates your inability to work loyally and efficiently under the Commissioner and Deputy Commissioner of the Internal Revenue Service and demonstrates that your separation will promote the efficiency of the Service.

Subsequently plaintiff received the following letter from the Secretary of the Treasury:

> Your replies to the charges filed against you on July 17, 1953, as amended by an additional specification dated August 19, 1953, have been considered.
>
> I have decided that your removal will promote the efficiency of the service, and, therefore, notify you that you will be removed from the position of Assistant Commissioner (Inspection), Internal Revenue Service, effective at the close of business October 7, 1953.

The Notification of Personnel Action for plaintiff's removal contained the following notation:

> Removal for inefficiency, incompetence and inability to work loyally under the Commissioner and the Deputy Commissioner.

Plaintiff was a nonveteran and his rights in case of removal were governed by the provisions of the act of June 10, 1948, 62 Stat. 354, 355, which read in part:

> No person in the classified civil service of the United States shall be removed or suspended without pay therefrom except for such cause as will promote the efficiency of such service and for reasons given in writing. Any person whose removal or suspension without pay is sought shall (1) have notice of the same and of any charges preferred against him; (2) be furnished with a copy of such charges; (3) be allowed a reasonable time for filing a written answer to such charges, with affidavits; and (4) be furnished at the earliest practicable date with a written decision on such answer. No examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer or employee directing the removal or suspension without pay. * * *

Under the applicable regulations it was provided that the Civil Service Commission might investigate the removal of an employee when such employee establishes a prima facie case that (1) the procedure described by the Commission had not been followed or (2) the removal was made for political reasons.

Plaintiff appealed his removal to the Civil Service Commission on the ground of procedural violations and political motivation in his removal. By letter of November 12, 1953, the Civil Service Commission informed plaintiff that there were no procedural defects in his removal but asked for further evidence on the allegation that plaintiff's removal was for political reasons. Plaintiff submitted an affidavit. On May 26, 1954, in a letter to plaintiff, the Chairman of the Civil Service Commission stated that it was the conclusion of the Commissioner that plaintiff was removed because the Treasury Department officials considered him deficient in the performance of his duties and that his removal was not politically motivated. About a year later the Civil Service Commission refused to reopen the appeal

in plaintiff's case; no reversible procedural defect was found to exist and no prima facie case of political motivation in the removal was said to have been established.

Plaintiff alleges that his removal was illegal because of certain procedural defects and because it was arbitrary in that it was based on political motivations. The procedural points raised are:

(1) Plaintiff did not get 90 days' notice.

(2) The charges were not specific.

(3) The dismissal was based on the reply plaintiff made to the original charges.

(4) The notice of adverse decision did not sufficiently state the reasons for plaintiff's removal.

Plaintiff's contention on the point of notice appears to be that since his removal was based on inefficiency he is entitled to the period of notice required for rating an employee unsatisfactory under the Performance Rating Act of 1950, 64 Stat. 1098, 1099, 5 U. S. C. 2001 et seq. (1952 Ed.). This contention has been considered by the Court of Appeals for the District of Columbia Circuit in *Thomas* v. *Ward*, 225 F. 2d 953, and *Jones* v. *Hobby*, 223 F. 2d 345. It was held that the 90-day notice period applied only to action under that act, and that where an employee is demoted or removed for cause under 5 U. S. C. 652 the procedure set forth in the latter statute governs. We agree with the holding of the Circuit Court and we accordingly hold that plaintiff was not entitled to 90 days' notice prior to his separation.

The three principal reasons advanced in the letter of charges were: (1) You have not demonstrated ability to develop an appropriate inspection program for the Internal Revenue Service; (2) You have not demonstrated ability to appropriately organize and control a going organization; and (3) You have not exhibited the degree of objectivity

and sound judgment essential to the adequate performance of a high-level Federal executive position.

Four specifications were listed under the first charge mentioned in the preceding paragraph; under the second charge three specifications were listed, and under the third charge two subdivisions were given. (Originally there was only 1 under the last heading.) While some of the specifications lacked a degree of specificity, there was at least one charge under each reason that was specific, and each of such specifications was of such a nature as would permit removal, if in the discretion of the appropriate official it would promote the efficiency of the service. Another remedy, such as demotion or transfer, might have been chosen and might have been better, but removal was not beyond the bounds of discretion in this case. This was a job at a very high level; the duties were of an executive nature requiring much ingenuity and creative judgment. What constitutes competence in this context is much more a matter of conjecture than in jobs more routine in nature. In a position of this consequence a wide discretion should be given responsible officials as to causes for removal that will promote the efficiency of the service.

The statute gives a civil service employee who has been charged "a reasonable time for filing a written answer" to the charges. This right would indeed be of little value if each answer were the basis for another charge. Nonetheless, a man is not entitled to make attacks on his superiors when he replies to the charges unless, of course, this attack can reasonably be construed to be necessary to the answer. We do not think they were here. The exchange of correspondence indicates a degree of animosity on both sides between plaintiff and his immediate supervisors. Such feelings may well have effectively precluded plaintiff's further employment in this particular position. Perhaps outright removal would not have been

the remedy we would have chosen. Perhaps a transfer to another position so he could have remained in the service if he desired to do so, might have been a more appropriate action. But our function is limited to judicial review. We cannot say that plaintiff's superiors stepped beyond the limits of allowable discretion in removing him.

The statute requires that an employee be furnished at the earliest practicable date with a written decision on his answer to the charges. Plaintiff claims that the decision in this case was not sufficient in that the specific reasons which formed the basis of the removal were not spelled out. The letter from the Secretary of the Treasury implies that plaintiff was removed on the basis of the charges preferred against him. The notification of personnel action speaks of removal for inefficiency, incompetence and inability to work loyally under the Commissioner and the Deputy Commissioner. Some of the valid specifications in the charge letter would come under the heading of inefficiency or incompetence although, as we have pointed out, these concepts cannot have the clear meaning in the context of a high executive position that they might have in other cases and the term may therefore have unnecessarily harsh implications here. The specification added as a result of plaintiff's reply is referred to in the last phrase of the notification, namely, inability to work loyally under the Commissioner and the Deputy Commissioner. It is a specific charge and forms an additional basis for the action taken. In the circumstances we are unable to find that the reasons for plaintiff's removal were not adequately given.

The Civil Service Commission considered plaintiff's allegation that his removal was politically inspired. This is the body that was officially designated by the Congress to make rules governing the selection of certain specified Federal employees and to supervise the operations of the Civil Service system. We do not think that the Commisson's decision is reviewable here since there is no showing

of arbitrary action on its part. On this question we do not perceive a triable issue. We will not, therefore, overturn the finding of the Civil Service Commission that plaintiff has not established a prima facie case that his removal was politically motivated.

There being no arbitrary, capricious, or otherwise illegal action, and there being no procedural defects in plaintiff's removal, we find that plaintiff is not entitled to recover and that defendant's motion for summary judgment should be granted. Plaintiff's petition will be dismissed.

It is so ordered.

LARAMORE, *Judge*, concurs.

WHITAKER, *Judge*, concurring:

I sympathize with much that Judge Madden has said in his dissenting opinion, but I agree with the majority that Congress has committed to the Civil Service Commission, and not to us, the review of the action of an agency in discharging an employee, and that we can take jurisdiction only if the action of the Civil Service Commission is arbitrary or otherwise unlawful.

I wish we could take jurisdiction because the procedure of the Civil Service Commission in this case leaves much to be desired. The head of an agency should have plenary control over the work of his subordinates. He should have the right to require from them loyal and efficient and competent service, and to discharge them if he cannot get it from them. But he has no right to discharge them for incompetency or inefficiency, if the real reason for their discharge was political considerations. This sets at naught the civil service law.

Where this issue is raised, with apparent justification, and not frivolously, it does seem, as Judge Madden says, that a man is entitled to a hearing in the nature of a trial

in a court. He should not be branded as an incompetent and inefficient public servant, if this was but a false pretense for his discharge. No man should be robbed of his good name, no more than of his goods.

In such case he should have the right to be confronted by those who say he is incompetent and inefficient and have the right to cross-examine them and rebut their testimony in any legitimate way.

> "Who steals my purse steals trash; 'tis something, nothing;
> 'Twas mine, 'tis his, and has been slave to thousands;
> But he that filches from me my good name
> Robs me of that which not enriches him
> And makes me poor indeed."

But the law and the regulations of the Civil Service Commission do not require a hearing, even in such a case, and, hence, the denial of one does not make the action of the Civil Service Commission unlawful and give us any right to review its action. It is only where the action of the Civil Service Commission is unlawful, for one reason or another, that we have a right to take jurisdiction and review the action taken.

For this reason, I concur in the majority opinion.

MADDEN, *Judge*, dissenting:

The plaintiff includes in his petition an allegation that his discharge was politically motivated. If that was so, it was a gross violation of the civil service statutes. The granting of the Government's motion for a summary judgment means that the plaintiff will never have had an opportunity, here or elsewhere, to prove the truth of his allegations.

The plaintiff presented to the Civil Service Commission a sworn statement which, if true, would persuade any reader of it that the motivation for reassigning or dismissing the

plaintiff was political, and had little relation to efficiency. This sworn statement appears at pages 45-47 of the defendant's brief. It would have seemed that the persons named in the statement would have been anxious to confront the plaintiff in a hearing, or at the very least, to file sworn statements denying the truth of the serious allegations against them. They did neither of these things. The only response which the plaintiff received to his sworn statement was a letter from the Chairman of the Civil Service Commission, which is printed on pages 47-48 of the defendant's brief. It says:

> Your representations that your removal was made for political reasons have been carefully investigated. The report of investigation, together with your statements, have been thoroughly studied by the Commissioners. Based on all of the evidence, it is our conclusion that you were removed because officials of the Treasury Department considered that you were deficient in the performance of your duties; neither your affidavit of December 10, 1953, nor the Commission's investigation support your contention that your removal was politically motivated. Accordingly, your appeal on this point is denied.

This letter contains no statement that anyone, in the course of the unilateral investigation made by the Civil Service Commission, had denied the truth of the plaintiff's sworn statement. Indeed, it said, "*neither your affidavit of December 10, 1953*, nor the Commission's investigation support your contention that your removal was politically motivated."

The statement of the Chairman that the plaintiff's affidavit did not support his contention is plainly wrong. What the Commission's investigation showed neither we nor the plaintiff know, nor will anyone ever know, now that the court has dismissed the plaintiff's petition.

It may be that the plaintiff's position was so high that it should not have been included in the classified Civil

Service. That is for Congress to decide, not for this court or the Civil Service Commission. When the desire to get rid of one in such a high position originates in politics, as the only sworn statement before us indicates that it did in this case, it is almost beyond human capacity to lay that motivation aside and judge fairly the question of a highly placed civil servant's efficiency. All of us do our work at a grade so far below perfection that it would be hard to prove that the service would not be improved by a change.

The statutes require that politics be kept out of the civil service. So far as appears, that was not done in this case. In fairness to the plaintiff, and to his superiors who have never had an opportunity to publicly answer his serious charges, I would dismiss the Government's motion and let this case go to trial.

LITTLETON, *Judge,* joins in the foregoing dissent.

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EDGAR E. HOPPE, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 1058

EDGAR E. HOPPE, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 2a-11a) has not yet been reported.

JURISDICTION

The judgment of the Court of Claims was entered on October 2, 1956. Petitioner's motion for rehearing was denied on March 6, 1957. The petition for a writ of certiorari was filed on June 4, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the Court of Claims correctly held that petitioner's removal from the Internal Revenue Serv-

ice violated none of his rights as an employee in the classified civil service.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of Section 6 of the Lloyd-LaFollette Act of August 24, 1912, 37 Stat. 539, 555, as amended, 5 U.S.C. 652 and of the Civil Service Commission regulations, 5 C.F.R. 9.101 *et seq.* are set out in the appendix, *infra*, pp. 11-14.

STATEMENT

On October 7, 1953, petitioner, a non-veteran in the classified civil service, was employed as Assistant Commissioner (Inspection), GS-18, in the Internal Revenue Service of the Treasury Department.

By letter dated July 17, 1953, O. Gordon Delk, Deputy Commissioner, notified petitioner of an intention to separate him from the service (R. 32-37). The letter set forth as the reasons for the proposed action three principal charges of inefficiency and incompetence in office, each of which were supported by one or more detailed specifications.[1] In addition to replying in detail to the charges, the petitioner in his answer made a number of counter-charges of conspiracy and other illegal acts on the part of his superiors (R. 70-92). Thereafter, the Secretary of the Treasury notified petitioner that the third charge in the letter of July 17,

---

[1] The principal charges were:

"(1) You have not demonstrated ability to develop an appropriate inspection program for the Internal Revenue Service. . . .

(2) You have not demonstrated ability to appropriately organize and control a going organization.

(3) You have not exhibited the degree of objectivity and sound judgment essential to the adequate performance of a high-level Federal executive position."

1953, was amended by the addition of a specification indicating that his allegations of illegal acts evidenced petitioner's inability to work loyally and efficiently under his superiors. Petitioner was granted time to respond and did so (R. 93-94).

On October 7, 1953, the Secretary of the Treasury notified petitioner:

> Your replies to the charges filed against you on July 17, 1953, as amended by an additional specification dated August 19, 1953, have been considered.
>
> I have decided that your removal will promote the efficiency of the service and, therefore, notify you that you will be removed from the position of Assistant Commissioner (Inspection), Internal Revenue Service, effective at the close of business October 7, 1953.

A Standard Form 50, Notice of Personnel Action, was prepared as of the same date, which stated that petitioner was removed for inefficiency, incompetence, and inability to work loyally under the Commissioner and Deputy Commissioner (R. 41).

On October 12, 1953, petitioner appealed to the Civil Service Commission contending that the charges were lacking in specificity, that he had not been heard personally on these charges, and that his removal was made for political reasons (R. 46-49). This appeal was supported by a brief filed by petitioner's counsel on November 9, 1953.

On November 12, 1953, the Chief, Service Record Division, advised petitioner that in the case of a non-veteran removed for inefficiency the judgment of the appointing officer was not reviewable by the Commis-

sion and that, while the Commission had authority to review where the required procedures were not followed, such procedures had been followed here (R. 49-51). Petitioner was further told that the Commission could consider the political motivation charge, if petitioner would submit a statement outlining all the facts and circumstances upon which the charge was based and such supporting evidence as he could obtain (R. 49-51). Petitioner submitted a sworn statement on December 7, 1953, and subsequently, through counsel, advised the Commission that he did not wish to submit any other material (R. 56).

On May 26, 1954, the Chairman of the Civil Service Commission notified petitioner that, based on careful investigation and study of the materials submitted, the Commission had concluded that the claim of political motivation for the dismissal was not supported (R. 55-56). Thereafter, on May 24, 1955, after a request for reconsideration, the Commission advised petitioner that further review revealed no procedural defects in the removal and that, on reconsideration of the contention that the removal was for political reasons, it was again found that there had not been established a *prima facie* case warranting further Commission action (R. 57-58).

On August 19, 1955, petitioner instituted this suit for back pay in the Court of Claims, alleging that his removal had been improper for substantially the reasons pressed upon the Civil Service Commission (R. 1-3). On October 2, 1956, the Court of Claims granted the Government's motion for summary judgment, holding that there was "no arbitrary, capricious, or otherwise illegal action and * * * no procedural defects in plain-

tiff's removal." (Pet. App. 8a). Subsequently, on October 26, 1956, petitioner's counsel requested the Civil Service Commission to permit him to review its file in the case, particularly its investigation in connection with the claim of political motivation (Motion for Rehearing, p. 23). On November 6, 1956, the Commission declined to comply with this request (Motion for Rehearing, p. 24). Petitioner moved for rehearing in the court below on November 30, 1956, and in connection therewith, on February 1, 1957, moved for an order requiring the Civil Service Commission to produce, among other things, the investigative report. The Government opposed on the grounds that the motion was out of time and the material sought was irrelevant to the issue on rehearing. On March 6, 1957, the Court of Claims, without opinion, denied the motion and the petition for rehearing (R. 105).

ARGUMENT

1. Although the petitioner claimed below that the removal action was procedurally defective in a number of respects, the only such invalidity now alleged is that the notice of adverse action failed to state the reasons for the Secretary's decision.[2]

Section 6 of the Lloyd-LaFollette Act of 1912, *infra*, p. 11, requires that after notice of charges and answer the employee be furnished "with a written decision on such answer". The applicable Civil Service Commission regulation, 5 C.F.R. 9.102(a)(1), *infra*, pp. 12-13,

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[2] Among the contentions now abandoned are (1) that the charges in the letters of July 17, 1953, as amended by the letter of August 19, 1953, lacked specificity; (2) that the dismissal violated the provisions of the Performance Rating Act of 1950; (3) that the dismissal was illegally based on a defense to the original charges; and (4) that the dismissal was politically motivated.

provides that the agency must consider the answer, must furnish the employee with a written decision, and, if the agency determines that removal or other action is warranted, the employee must be notified in the decision of the reasons for the action taken and its effective date. As the Court of Claims determined (Pet. App. 7a), the notice of removal here constitutes substantial compliance with these requirements.

The letter of October 7, 1953, notifying petitioner of the decision of the Secretary of the Treasury, stated that the replies to the charges contained in the two notices had been considered, that the Secretary had decided that petitioner's removal would promote the efficiency of the service, and therefore, that he would be removed at the close of business on October 7, 1953. It is clear from this notice that the basis of the Secretary's decision and the only basis for that decision were the charges in the two letters and petitioner's answers to those charges. There was no need to repeat the charges as they had been set forth in detail in the notices of proposed adverse action. Moreover, the notice of personnel action of October 7, 1953, stated that removal was "for inefficiency, incompetence and inability to work loyally under the Commissioner and Deputy Commissioner," (Pet. App. 7a) which were precisely the reasons set forth in the charges on which the Secretary expressly relied in the notice of adverse action. As noted in *Mulligan* v. *Andrews*, 211 F. 2d 28 (C.A. D.C.), according to the Civil Service Commission's interpretation of its regulations governing removal,[3] the requirement of reasons in the notice of adverse action is to make certain that removal is based

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[3] See Federal Personnel Manual, S 1-28 (1949).

solely on stated charges. We believe that no other meaning is reasonably inferrable from a reading of the Secretary's letter here.

Petitioner's reliance on *Mulligan* v. *Andrews, supra,* and *Blackmar* v. *United States,* 120 F. Supp. 408 (C. Cls.) is unfounded. In the *Mulligan* case, *supra,* at p. 30, the Court of Appeals expressly based its holding of procedural irregularity on the fact that the notice of adverse action included no mention at all of the charges against the employee, referring only to his reply "together with the facts developed during the investigation", and concluding that "the evidence is such as to show your unsuitability for continuance * * *." The *Blackmar* case, on the other hand, concerned uncertainty as to the basis for a decision by a reviewing authority, and the language quoted by petitioner (Pet. 8) is in no way related to initial notification of adverse action by the agency head.

2. Petitioner's further contention, that in enacting Section 6 of the Lloyd-LaFollette Act, *infra,* p. 11, Congress intended to give him a right to a review on the merits by the Civil Service Commission (Pet. 4-5), was properly rejected by the Court of Claims in view of the statutory language and legislative history.[4] While Section 6 of the Act permits removal of classified civil service employees only for such cause as will promote the efficiency of the service, it does not follow that either the Civil Service Commission or the courts may judge the sufficiency of that cause. When the Act was passed in 1912, it made no provision for appeal to the

[4] This argument was made by petitioner on his motion for rehearing which, as noted before, was denied, without opinion, by the Court of Claims.

Civil Service Commission or for any hearing by that body, and it makes no such provision now.

Long prior to the enactment of the Lloyd-LaFollette Act, this Court held that the question of what constituted cause for removal of a classified employee was for the judgment of the removing officer. *Keim* v. *United States*, 177 U.S. 290. And it is settled that the Act did not modify this holding. *Eberlein* v. *United States*, 257 U.S. 82; *Williams* v. *Cravens*, 210 F. 2d 874 (C.A. D.C.), certiorari denied, 348 U.S. 819; *Carter* v. *Forrestal*, 175 F. 2d 364 (C.A. D.C.), certiorari denied, 338 U.S. 832; *Powell* v. *Brannan*, 196 F. 2d 871 (C.A. D.C.).[5]

The Commission's regulation, 5 C.F.R. 9.105,[6] *infra*, pp. 13-14, providing that, except as required in the case of veterans, the Commission "shall not investigate or review the sufficiency of the reasons for removal" carries out the Congressional intent. In order, however, to protect an employee from removal without compliance with applicable procedural requirements, for purely political reasons, or because of marital status, the Commission has provided that it may investigate a removal when the employee establishes a *prima facie* case that his separation was for any of these reasons. Petitioner's contentions that, in removing him, the agency failed to comply with certain procedural requirements

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[5] That Congress never intended to provide for administrative review which would impede executive discretion in the question of reasons for removal of non-veterans is made evident by a comparison of the Lloyd-LaFollette Act with section 14 of the Veterans' Preference Act of 1944, 58 Stat. 390, as amended, 5 U.S.C. 863, which explicitly provides a right of appeal to the Civil Service Commission from dismissal actions against veterans.

[6] The provisions of this section have not been substantially changed since issued under Executive Order 7915, June 24, 1938, effective, February 1, 1939; 3 Fed. Reg. 1519, *et seq.*

and that his removal was politically motivated were investigated and rejected by the Commission on petitioner's several appeals.[7] He thus received all he was entitled to under the Lloyd-LaFollette Act and the applicable regulations.

3. Petitioner also urges that the proceedings resulting in his removal were defective because he was denied the right to examine "the investigative and appeal record" (Pet. 5-7). But petitioner did not request access to these records during the administrative proceeding and indeed first wrote the Commission for such permission only after the court below had issued its adverse opinion. See *supra*, p. 5. Moreover, although petitioner's argument is phrased in terms of an improper "classification" of the Commission's reports, the Commission's letter using the words "privileged and confidential" does not appear to refer to a formal classification of the material in a security sense, but rather to the fact that the papers requested were internal files rather than public ones (Ex. E, Motion for Rehearing). The Commission's action had not been in the nature of a hearing to review petitioner's dismissal, but had constituted an attempt to determine whether petitioner had made a *prima facie* showing that the real basis for his removal was being concealed. Since the Commission had satisfied itself that no hearing was necessary, there was nothing in the nature of

[7] The allegations of procedural violations were rejected in the three letters from the Commission to the petitioner dated November 12, 1953, May 26, 1954, and May 24, 1955. Petitioner's contention of political motivation was rejected on the latter two occasions. All but one of these contentions have now been abandoned. See *supra*, p. 5, fn. 2.

a record to be disclosed. Petitioner was really attempting to pry into the internal workings of the Commission, a matter which is, of course, not required to be disclosed. Cf. *Morgan* v. *United States*, 313 U.S. 409, 422.

4. Finally, petitioner asserts that the Commission improperly failed to consider representations of his counsel "at the first level of appeal" (Pet. 9). The claim is apparently based on the fact that his counsel's brief to the Commission in support of his charges of procedural defects and political motivation in his removal was mailed on November 9, 1953, and the Commission rejected the former charge by letter dated November 12, 1953. This short interval of time, however, does not indicate that the brief went unconsidered by the Commission in issuing its ruling. And, in any event, petitioner was represented by counsel on the two subsequent stages of his appeal before the Commission at which time all allegations presented by petitioner were thoroughly considered and rejected.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY, 1957.

APPENDIX

1. Section 6 of the Lloyd-LaFollette Act of August 24, 1912, 37 Stat. 539, 555, as amended 5 U.S.C. 652 provides:

> (a) No person in the classified civil service of the United States shall be removed or suspended without pay therefrom except for such cause as will promote the efficiency of such service and for reasons given in writing. Any person whose removal or suspension without pay is sought shall (1) have notice of the same and of any charges preferred against him; (2) be furnished with a copy of such charges; (3) be allowed a reasonable time for filing a written answer to such charges, with affidavits; and (4) be furnished at the earliest practicable date with a written decision on such answer. No examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer or employee directing the removal or suspension without pay. Copies of the charges, the notice of hearing, the answer, the reasons for removal or suspension without pay, and the order of removal or suspension without pay shall be made a part of the records of the proper department or agency, as shall also the reasons for reduction in grade or compensation; and copies of the same shall be furnished, upon request, to the person affected and to the Civil Service Commission. * * *

2. The regulations of the Civil Service Commission, 5 C.F.R. 9.101, *et seq.* provide in pertinent part:

> § 9.101 *Agency responsibility for separation or demotion of employees.* (a) The employing agency shall remove, demote, or reassign to another position any employee in the competitive service whose

conduct or capacity is such that his removal, demotion, or reassignment will promote the efficiency of the service. The grounds for disqualification of an applicant for examination stated in § 2.104 (a) (2) through (8) of this chapter shall be included among those constituting sufficient cause for removal of an employee.

(b) The discretion vested in the appointing officer to remove employees under his jurisdiction, or to take other disciplinary action, is subject only to the following restrictions:

(1) Employees serving under other than probational or temporary appointments in the competitive service and employees having a competitive status who occupy positions in Schedule A or B of Part 6 of this chapter, which are not of a primarily confidential or policy determining character, shall not be removed, suspended, or demoted except for such cause as will promote the efficiency of the service and in accordance with the procedure prescribed in § 9.102.

(2) Discrimination shall not be exercised in removals, suspensions, or demotions because of an employee's religious opinions or affiliations, or because of his marital status or race, or except as may be required by law because of his political opinions or affiliations.

(3) Like penalties shall be imposed for like offenses whenever removals, suspensions or demotions are made, or when other disciplinary actions are taken.

§ 9.102 *Procedure in separating, suspending, or demoting permanent and indefinite employees.*

(a) * * *

(1) *Actions against employees.* No employee, veteran or nonveteran, shall be separated, sus-

pended, or demoted except for such cause as will promote the efficiency of the service and for reasons given in writing. The agency shall notify the employee in writing of the action proposed to be taken. This notice shall set forth, specifically and in detail, the charges preferred against him. The employee shall be allowed a reasonable time for filing a written answer to such charges and furnishing affidavits in support of his answer. He shall not, however, be entitled to an examination of witnesses, nor shall any trial or hearing be required except in the discretion of the agency. If the employee answers the charges, his answer must be considered by the agency. Following consideration of the answer, the employee shall be furnished at the earliest practical date with a written decision. If the agency determines that removal or other action is warranted, the employee shall be notified in the decision of the reasons for the action taken and its effective date. Copies of the charges, notice of hearing (if any), answer, reasons for removal, or other action, shall be made a part of the records of the department or agency concerned.
* * *

* * * * *

§ 9.105 *Authority of Commission to investigate separations, suspensions, reassignments, or demotions.* (a) Except as required by section 14 of the Veterans' Preference Act, the Commission shall not investigate or review the sufficiency of the reasons for removal, suspension, reassignment, or demotion of an employee.

(b) The Commission may investigate the removal, suspension, reassignment or demotion of an employee when such employee establishes a prima facie case that:

(1) The procedure prescribed by the Commission under § 9.102 (a) (1) has not been followed (regardless of other allegations); or

(2) The removal, suspension, reassignment or demotion was made for political reasons, except as may be required by law, or resulted from discrimination because of marital status. * * *